Supreme Court, U.S.
FILED
DEC 8 1998
CLERK

(24)

No. 98-97

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ELOISE ANDERSON, *et al.*,
Petitioners,
v.
BRENDA ROE AND ANNA DOE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Ann E. Bushmiller*
Edward R. McNicholas
SIDLEY & AUSTIN
1722 Eye St., N.W.
Washington, DC 20006
(202) 736-8253

Maria Foscarinis
NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY
918 F Street, N.W., Suite 412
Washington, DC 20004
(202) 638-2535

Counsel for Amicus Curiae

*Counsel of Record

December 8, 1998

BEST AVAILABLE COPY

41pp

QUESTION PRESENTED

Amicus curiae will address the following question:

Whether a State may enact a law that penalizes the exercise of the right to interstate migration by substantially limiting the TANF benefits available to new residents for basic subsistence.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

I. CALIFORNIA'S LIMIT ON FIRST-YEAR TANF PAYMENTS SIGNIFICANTLY BURDENS THE RIGHT TO INTERSTATE MIGRATION 6

A. The Constitution's Tradition And Structure Require The Right To Interstate Migration. 7

B. California Directly And Intentionally Penalizes The Exercise Of The Constitutional Right To Interstate Migration. 12

II. CALIFORNIA'S RESIDENCY CLASSIFICATION CANNOT SURVIVE JUDICIAL SCRUTINY 16

A. Section 11450.03 Fails Strict Scrutiny 16

B. Section 11450.03 Fails Intermediate Scrutiny 19

C. Section 11450.03 Is Not Rationally Related To Its Stated Goals 24

D. California's Program Fails Privileges And Immunities Scrutiny 26

III. CONGRESS CANNOT AUTHORIZE CONSTITUTIONAL VIOLATIONS BY REDEFINING THEM AS A "CHOICE OF LAW" 29

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. *Pena*,
515 U.S. 200 (1995) 30

Aptheker v. *Secretary of State*,
378 U.S. 500 (1964) 9, 11

Attorney General v. *Soto-Lopez*,
476 U.S. 898 (1986) 10, 15, 16, 17

Austin v. *New Hampshire*,
420 U.S. 656 (1975) 29

Baldwin v. *Montana Fish and Game Comm'n*,
436 U.S. 371 (1978) 26

City of Boerne v. *P.F. Flores*,
117 S. Ct. 2157 (1997) 29

City of Cleburne, Texas v. *Cleburne Living Center, Inc.*,
473 U.S. 432 (1985) 26

City of Richmond v. *J.A. Croson Co.*,
488 U.S. 469 (1989) 30

Corfield v. *Coryell*,
6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) 11

Crandall v. *Nevada*,
73 U.S. (6 Wall.) 35 (1867) 7, 11, 26

Dandridge v. *Williams*,
397 U.S. 471 (1970) 17, 26

Duncan v. *Louisiana*,
391 U.S. 145 (1968) 10

Dunn v. *Blumstein*,
405 U.S. 330 (1972) 8, 16, 17

Edwards v. *California*,
314 U.S. 160 (1941) 11

Graham v. *Connor*,
490 U.S. 386 (1989) 9

Hicklin v. *Orbeck*,
437 U.S. 518 (1978) 27

Hooper v. *Bernalillo County Assessor*,
472 U.S. 612 (1985) 14, 15, 18

Kent v. *Dulles*,
357 U.S. 116 (1958) 11

Kolender v. *Lawson*,
461 U.S. 352 (1983) 9

Memorial Hospital v. *Maricopa County*,
415 U.S. 250 (1974) ..... *passim*

Michael H. v. *Gerald D.*,
491 U.S. 110 (1989) 9

Moore v. *City of East Cleveland, Ohio*
431 U.S. 494 (1977) 7, 26

Papachristou v. *City of Jacksonville*,
405 U.S. 156 (1972) 9, 21

The Passenger Cases,
48 U.S. (7 How.) 283 (1849) 11

Paul v. *Virginia*,
75 U.S. (8 Wall.) 168 (1868) 10

Plaut v. *Spendthrift Farm, Inc.*,
514 U.S. 211 (1995) 29

Shapiro v. *Thompson*,
394 U.S. 618 (1969), ... 8, 16, 18, 30

United States v. *Carolene Products Co.*,
304 U.S. 144 (1938) 21

United States v. *Guest*,
383 U.S. 745 (1966) 8, 9, 26

United States v. *Wheeler*,
254 U.S. 281 (1920) 8

Williams v. *Fears*,
179 U.S. 270 (1900) 9

Zobel v. *Williams*,
457 U.S. 55 (1982) ..... *passim*

STATUTES AND REGULATIONS

Cal. Welf. & Inst. Code § 11450.03 (West 1997) . . . *passim*

Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, Title 1, § 103(a)(1), 110 stat. 2112 6

Fair Market Rents for Section 8 Housing Assistance Payments Program -- Fiscal Year 1998, 62 Fed. Reg. 50,724 (1997) (to be codified at 24 C.F.R. pt. 888) 3

CHARTERS AND CONSTITUTIONS

Pa. Const. of 1776 8

R.I. Charter of 1796 8

U.S. Const. art IV, § 2, cl. 1 10

LEGISLATIVE HISTORY

Cong. Globe, 39th Cong., 1st Sess., 2542 (1865) 10

Cong. Globe, 39th Cong., 1st Sess., 1265 (1865) 10

Cong. Globe, 42d Cong., 1st Sess., 84 (1871) 10

OTHER AUTHORITIES

Ellen L. Bassuk, *Homeless Families*, 265 Sci. Am. 66 (1991) 4

1 William Blackstone, *Commentaries* *130 7

Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1994* (114th ed. 1994) 22

Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1997* (117th ed. 1997) 22

Martha Burt, *Critical Factors in Counting the Homeless*, 65 Am. J. Orthopsychiatry (1995) 2

Center on Social Welfare Policy and Law, *Jobless, Penniless and Often Homeless: State General Assistance Cuts Leave "Empolyables" Struggling for Survival* (1994) 3

Committee on Ways and Means, U.S. House of Representatives, *Green Book* (1998) 3

Linda Crowell, *et al.*, Case Western Reserve Univ., *A Survey of GA Recipients Before and After Program in Cuyahoga County* (1992) 3

James N. Dertouzous & Robert F. Schoeni, *Preparing for Welfare Block Grants: Issues Facing California, in The New Fiscal Federalism and the Social Safety Net: A View From California* (James Hosek & Robert Levine eds., 1996). 22, 23

John Hart Ely, *Democracy and Distrust* (1980) 10

Jacqueline Jones, *The Dispossessed: America's Underclasses from the Civil War to the Present* (1992) 21, 22

1 James Kent, *Commentaries on American Law* *32 8

William Michelson, *Residential Mobility and Urban Policy, in Residential Mobility and Public Policy* 79 (Urban Affairs

Annual Reviews Volume 19, W.A.V. Clark & Eric G. Moore eds., 1980) 22

Michigan League for Human Services, *Final Report: The Impact on Individuals and Communities of the Reductions in Social Services in Michigan 1991-1992* (1993) 3

Yvonne Rafferty & Marybeth Shinn, *The Impact of Homelessness on Children*, 45 Am. Psychologist 11 (1991) .4

Michael Spector, *Drifter Mounts Attack Against Siberia's Homeless System*, Houston Chronicle, Feb. 1, 1998 11

Sergei Strokan, *Russia: Banning the 'Bomzhi,' Moscow Mayor's War on the Homeless*, InterPress News Service, Sept. 24, 1996 11

Laurence H. Tribe & Michael C. Dorf, *On Reading The Constitution* (1991) 10

U.S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities* (1997) 2

U.S. Dep't of Labor, *Employment and Training for America's Homeless* (1998) 3, 4

Barry Wellman, *The Place of Kinfolk in Personal Community Networks, in Families in the U.S.: Kinship and Domestic Politics* 231 (Karen V. Hansen & Anita Ilta Garey eds., 1998) 21

James D. Wright & Joel A. Devine, *Housing Dynamics of the Homeless: Implications for a Count*, 65 Am. J. Orthopsychiatry 320 (1995) 2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

ELOISE ANDERSON, *et al.*,
Petitioners,
v.
BRENDA ROE AND ANNA DOE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The National Law Center on Homelessness and Poverty is a not-for-profit organization based in Washington, D.C., established to address issues related to homelessness and poverty at the national level.[1] Poor and homeless people are frequently without effective political voice or power. The Center works with groups throughout the country to ensure that the constitutional and statutory rights of homeless families and individuals are protected and that laws are not selectively enforced against them. The Center also works with federal, state and local policymakers to develop constructive policies to

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

help homeless persons out of poverty and into self-sufficiency. Recently, the impact of welfare reform on poor and homeless families has been a focus of the Center's work. The Center and its counsel have extensive experience with federal constitutional questions affecting homeless people and the First, Fifth and Fourteenth Amendments, and believes that they can offer expertise that will be helpful to the Court.

STATEMENT

Approximately two million Americans experience homelessness annually.[2] Among the homeless population, families with children are the fastest-growing subgroup: overall, children now make up 25% of the homeless population. U. S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities* (1997). Major causes of family homelessness include extremely low incomes coupled with high housing costs. *Id.* Income assistance programs -- and in particular the adequacy of the benefit levels to meet housing costs in a particular community -- are critical both in preventing homelessness and in helping homeless persons into self-sufficiency. *Id.* at 82-87.

Inadequate benefit levels can lead directly to homelessness. Studies in states that reduced or eliminated their welfare benefits for single individuals found that the result was homelessness for a significant percentage of recipients or former

---

[2] Martha Burt, *Critical Factors in Counting the Homeless*, 65 Am. J. Orthopsychiatry 334 (1995); James D. Wright & Joel A. Devine, *Housing Dynamics of the Homeless: Implications for a Count*, 65 Am. J. Orthopsychiatry 320 (1995).

recipients.[3] For families who are already homeless, adequate benefits are essential to their ability to move into housing. Further, the success of efforts to move recipients into work depend to a large extent on the adequacy of benefits to meet housing costs: without stable housing, it is extremely difficult for homeless families to obtain and maintain employment.[4]

Housing costs -- perhaps more than any other basic living cost -- vary dramatically across the country. Housing costs in California are among the highest in the nation. For example, for a two bedroom apartment in Los Angeles, the fair market rent (an indicator set by the federal government) is $737; in San Francisco it is $987.[5] The California TANF benefit for a family of four, set at $673, is alone insufficient to afford housing in the absence of other income or assistance.[6] For a family receiving a lower benefit -- for example, the Arizona

---

[3] Center on Social Welfare Policy and Law, *Jobless, Penniless and Often Homeless: State General Assistance Cuts Leave "Employables" Struggling for Survival* (1994); Michigan League for Human Services, *Final Report: The Impact on Individuals and Communities of the Reductions in Social Services in Michigan 1991-92* (1993) (25% of former recipients homeless within six months of losing benefits); Linda Crowell, *et al.*, *A Survey of GA Recipients Before and After Program in Cuyahoga County* 43-44 (1992) (in Ohio homelessness jumped 17% within six months of reductions).

[4] U.S. Dep't of Labor, *Employment and Training for America's Homeless* (1998).

[5] Fair Market Rents for the Section 8 Housing Assistance Payments Program -- Fiscal Year 1998, 62 Fed. Reg. 50,724, 50,731(1997) (to be codified at 24 C.F.R. pt. 888).

[6] Committee on Ways and Means, U.S. House of Representatives, *Green Book* 524-25 (1998) (Table 7-47).

TANF benefit, set at $418 -- the housing costs are prohibitive. For a family receiving the Mississippi TANF benefit of $144, finding housing in California will be virtually impossible.

Families who become homeless as a result will face severe and permanent harm. Numerous studies demonstrate that compared to their housed peers, homeless children experience higher rates of developmental delays, perform less well in school -- including lower test scores, higher rates of absenteeism, and higher likelihood of being held back -- and suffer disproportionately from psychological problems.[7] Further, homelessness and the barriers imposed by the resulting lack of an address, telephone, transportation, shower and appropriate clothes make it difficult to secure and sustain employment.[8] Families that fail to secure employment face the prospect of sanctions under TANF for failing to comply with the work requirements, and thus face spiraling hardships.

Benefits set at levels that are sufficient for families to afford housing in the community in which they live are critically important to prevent homelessness for those families and to further their self-sufficiency as intended by welfare reform. California's multi-tiered set of benefit levels for its new residents undermines the stated purpose of welfare reform and imposes severe hardship on families from lower benefit states.

---

[7] Ellen L. Bassuk, *Homeless Families*, 265 Sci. Am. 66, 70-71 (1991); Yvonne Rafferty & Marybeth Shinn, *The Impact of Homelessness on Children*, 45 Am. Psychologist 11, 1170-79 (1991).

[8] U.S. Dep't of Labor, *Employment and Training for America's Homeless* (1998).

SUMMARY OF THE ARGUMENT

The existence of a right to travel to and reside in a new state cannot be seriously doubted. This right has been affirmed under several constitutional doctrines throughout the nation's history because it is a fundamental part of our federal union. Indeed, California declines to challenge the existence of a right to interstate migration directly and instead focuses on the ability of its TANF program to survive judicial scrutiny.

Any statute that denies the bona fide citizens of a state basic necessities of life based solely on how recently they have moved to the state penalizes the exercise of the right to interstate migration. By denying Respondents sometimes more than half of TANF payments already calculated at subsistence levels, California allows new immigrants into the state to face hunger and homelessness if they lose their jobs.

A program expressly designed to inhibit interstate migration does not further a legitimate government purpose. Because of the fundamental nature of the right to migrate in a federal union, California must provide a compelling justification for its actions. California, however, effectively concedes that its objectives are not compelling by arguing merely that they survive rationality review as social and economic legislation.

California's stated objective -- protecting the public fisc -- cannot justify this discrimination among its citizens, and its means are not rationally related to its end. Given California's focus on recent immigrants, it is absurd to suppose that California intended to accomplish any goal except to deter migration. Indeed, California invokes its fear of a flood of immigrants causing a race-to-the-bottom in TANF benefits to

justify its parsimony. Not only does this justification reveal California's illicit purpose, but it also indicates the weak link between California's purpose and methods. The "race-to-the-bottom" economic model is simply not accurate because increased TANF payments are theoretically and empirically an insufficient incentive to attract new immigrants.

California's categorical penalty of new residents applying for TANF benefits is substantially over- and under-inclusive of its ends. The program makes no attempt whatsoever to grant exceptions for persons who suffer an accident or to identify and reduce incentives for immigrants who move for a higher cash grant. Moreover, the program does not even attempt to affect the incentives of long-term California residents, residents from states with higher TANF grants, or international immigrants.

California cannot rely upon the justifications offered by Congress in passing PWORA[9] *four years* after it created its system. Congress may not violate the Constitution any more than California may, and Congress' *post-hoc* authorization does not justify California's attempt to exclude recent immigrants.

ARGUMENT

I. CALIFORNIA'S LIMIT ON FIRST-YEAR TANF PAYMENTS SIGNIFICANTLY BURDENS THE RIGHT TO INTERSTATE MIGRATION.

California's discriminatory treatment of its citizens with less than one year of residency, Cal. Welf. & Inst. Code

[9] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PWORA"), Pub. L. No. 104-193, Title 1, § 103(a)(1), 110 Stat. 2112.

§ 11450.03 (West 1997), substantially burdens the right to travel and migration of such citizens. That the denial of sometimes more than half of subsistence benefits is a substantial burden cannot be seriously questioned. Likewise, given its multiple historical and structural manifestations, the existence of a right to migration and travel should not be at serious issue.

A. The Constitution's Tradition And Structure Require The Right To Interstate Migration.

This Court long has recognized and protected the right to interstate migration under various rubrics, most prominently equal protection. Although California concedes the validity of the right itself, its *amici* assert that this Court's articulation of a right to interstate migration was an "isolated anomaly." States Br. at 2. Such a position conflicts with both constitutional history and structure. This Court has consistently prohibited state actions that penalize the rights to interstate migration and travel because such rights inhere in the constitution's structure and, indeed, the very idea of a federal union. See, *e.g.*, *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 43-44 (1867).

The right to interstate travel and migration is one "deeply rooted in this Nation's history and tradition." *Moore* v. *City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977) (note omitted). Blackstone recognized that "personal liberty consists in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct." 1 William Blackstone, *Commentaries* *130. Similarly, the Pennsylvania Constitution of 1776 and the Rhode Island

Charter of 1796 recognize the right to travel.[10] See also 1 James Kent, *Commentaries on American Law* * 32 (recognizing a duty to grant passage). In all states, from their founding onward, citizens have possessed "the fundamental right, inherent in the citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom." *United States* v. *Wheeler*, 254 U.S. 281, 293 (1920); see also *United States* v. *Guest*, 383 U.S. 745, 757-58 (1966) (considering a right to travel a "firmly established and repeatedly recognized . . . basic right under the Constitution").

This tradition of freedom of movement has found its most forceful expression in cases under the banner of equal protection. In three cases, *Shapiro* v. *Thompson*, 394 U.S. 618, 638 (1969), *Dunn* v. *Blumstein*, 405 U.S. 330, 338-39 (1972), and *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 261-62 (1986), this Court has struck down durational residency requirements that affected basic necessities of life -- subsistence, voting, and non-emergency medical care. Each of these cases held unconstitutional state action which created two classes of residents distinguishable only by length of residence and then used this criterion to deny a basic necessity to the newcomers. In each of these cases, this Court applied strict scrutiny and held that the government's categorization of its citizens based on residency did not further a legitimate purpose. As the Court

---

[10] Pennsylvania Constitution of 1776, ch. 1, para. XV ("That all men have a natural inherent right to emigrate from one state to another that will receive them, or to form a new state . . . whenever they think that thereby they may promote their own happiness."); Rhode Island Charter of 1796 ("[I]t shall be lawful to and for the inhabitants of the said Colony of Providence Plantations, without let or molestation, to pass and repass, with freedom, into and through the rest of the English Colonies, upon their lawful and civil occasions . . . .").

held in *Memorial Hospital*: "[T]he right of interstate travel must be seen as insuring new residents the same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents." 415 U.S. at 261.[11]

This Court's substantive due process jurisprudence has also recognized a right to travel as an aspect of personal liberty "'so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" *Michael H.* v. *Gerald D.*, 491 U.S. 110, 122 (1989) (internal citation omitted). As early as *Williams* v. *Fears*, 179 U.S. 270, 274 (1900), this Court recognized the right to interstate travel under this rubric. *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972), similarly recognized a right not to be barred from, among other things, "wandering or strolling [ ] from place to place." *Id.* at 156-57 n.1 (quotation omitted); see also *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983); *Guest*, 383 U.S. at 758.[12]

---

[11] In addition to penalizing travel, California's provision also violates equal protection in the sense of allowing reverse discrimination based on national origin. Under the California system, a person migrating from another state receives benefits at his former state's level, if the former state's benefits are lower. A person migrating from any foreign country such as Mexico, however, receives full California benefits from their first day. Section 11450.03 may make a person better off by not being an American.

[12] Such an approach is fully consistent with the demands of *Graham* v. *Connor*, 490 U.S. 386 (1989), and progeny that prefers reference to an explicit source of constitutional protection over generalized invocations of substantive due process. Given the structural nature of the right to travel and migration and its lack of an express textual referent, the right to travel is suited for substantive due process analysis. *See Aptheker* v. *Secretary of State*, 378 U.S. 500, 505-06 (1964) (locating a right to international travel in the substantive component of the due process clause).

Given the importance of the right to travel to personal liberty, it is not surprising that several Justices have located the right to travel and migration in the Privileges and Immunities Clause of Article IV, § 2. As Justice O'Connor wrote in *Zobel* v. *Williams*, 457 U.S. 55 (1982) and *Attorney General* v. *Soto-Lopez*, 476 U.S. 898 (1986), the fact that a recent immigrant is harmed only after establishing new residency is not of significance because the new resident is harmed as if she were a non-resident. In taking this plain text reading of Privilege and Immunities, Justice O'Connor not only emphasizes the structural and symbolic importance of the right to travel but also reflects the historical importance of the clause. *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868) (involving Privileges and Immunities clause of Article IV, § 2).[13] By recognizing that the Clause was not intended to be devoid of meaning, this approach underscores the importance of the right to interstate migration as a fundamental and personal right that is part of the set of rights of *national* citizenship.[14]

---

[13] The framers of the Fourteenth Amendment's Privileges or Immunities Clause, who were attempting to reflect the content of Article IV, certainly thought the clause had significant meaning. *See* Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* 53 (1991); John Hart Ely, *Democracy and Distrust* 22-30 (1980); *see also* Cong. Globe, 39th Cong., 1st Sess., 2542 (1865) (declaring that the amendment protected the privileges and immunities of all of the citizens and the "inborn rights of every person"); Cong. Globe, 42d Cong., 1st Sess., 84 (1871) (explaining privileges or immunities by reference to the first eight amendments to the Constitution); Cong. Globe, 39th Cong., 1st Sess., 1265-66 (1865) (explaining that the Clause included the rights listed in Justice Washington's *Corfield* opinion as well as the Bill of Rights).

[14] By identifying the right as a national right enforceable against the State, Justice O'Connor's approach would resolve many of the difficulties associated with the incorporation doctrine. Cf. *Duncan* v. *Louisiana*, 391 U.S. 145, 166 (continued...)

The right to travel and to interstate migration is so deeply embedded that several cases have found the right to be located in other provisions or as inherent in the federal union. See, *e.g.*, *Edwards* v. *California*, 314 U.S. 160, 173-74 (1941) (relying upon the Commerce Clause); *Corfield* v. *Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J., on circuit) (listing the "right of a citizen of one state to pass through, or to reside in any other state . . . " as one of those "privileges and immunities which are, in their nature, fundamental.")[15] As the Court in *Crandall* opined, the right to interstate travel is inherent in general principles of federalism. 73 U.S. (6 Wall.) at 43-44. Based in part on the economic importance of unfettered mobility for factors of production, whether materials or labor, this Court has consistently rejected restrictions on the right to travel in, ironically, Communist Party affiliation cases, *Kent* v. *Dulles*, 357 U.S. 116, 117-19, 130 (1958); *Aptheker*, 378 U.S. at 514.[16] Whatsoever is true of the right to interstate migration, it must be admitted that it did not

---

[14] (...continued)
(1968) (Black, J. concurring) (arguing for incorporation through the Privileges or Immunities Clause).

[15] *See also The Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting) ("We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption").

[16] Even Russia itself is now re-thinking its system of *propiska*, which are passport stamps allowing residency only in a particular city used to restrict the labor market and to justify arresting homeless persons and dispersing them outside of city borders. *See, e.g.*, Michael Specter, *Drifter Mounts Attack Against Siberia's Homeless System*, Houston Chronicle (Feb. 1, 1998); Sergei Strokan, *Russia: Banning the 'Bomzhi,' Moscow Mayor's War on the Homeless*, InterPress News Service (Sept. 24, 1996).

begin or end with *Shapiro*, and is certainly not the "isolated anomaly" that petitioners' *amici* accuse it of being.

B. California Directly and Intentionally Penalizes the Exercise of the Constitutional Right to Interstate Migration.

Petitioners deny that their TANF program has any impact on a citizen's right to travel, or at most imposes a "remote and incidental" impact. Pet. Br. at 25. The facts are otherwise. On its face, § 11450.03 targets only TANF applicants who have recently migrated to California. It limits the grants which enable recent arrivals to provide themselves with the basic necessities of life to the amount available in their former states (whenever that amount is less than California's benefits). While California's first-year penalty does not expressly bar the migration of workers, it does penalize travel by increasing the risk that a person could move into California, with its higher cost of living, only to find herself trying to live on a TANF benefit not calibrated to California's cost of living. In Respondent Roe's case, California would provide her only *54 percent* of the benefits that an identically-situated citizen who lived in California for a year and a day would receive.[17] So substantial a decrease certainly endangers the recipients' ability to obtain the necessities of life. One year without adequate food or shelter is catastrophic. California's TANF program thus

[17] Petitioners' argument that the success of this litigation would make it unconstitutional for states to have different benefit levels (Pet. Br. at 20 n.5) seriously misstates Respondents' position. California has created two classes of its *own* residents based solely on length of residence and former address, factors not rationally related to benefits. This argument has no application to the ability of each state to set its own level of benefits.

imposes a sufficiently grave burden so as to constitute a penalty for constitutional reasons.

The reduced benefits provided to recently-arrived residents are similar to the denial of non-emergency medical care to new residents that this Court struck down in *Memorial Hospital*. There, the State of Arizona provided emergency medical care to new indigent residents but refused to provide them with the non-emergency medical care it provided to its long-term indigent residents. 415 U.S. at 258. The Court recognized that "governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements." *Id.* at 259. The Court found non-emergency medical treatment to be a 'basic necessity' and determined that depriving new residents of such treatment penalized the right to travel. In so ruling, the Court declared that the right of travel insured new residents the "same right to vital government benefits and privileges in the States to which they migrate as are enjoyed by other residents." *Id.* at 261.

Section 11450.03 provides certain new residents in California with a fraction of the "vital government benefits" for the basic necessities of life that are provided to longer term residents. Under *Memorial Hospital*, this unequal treatment of residents penalizes the new resident's right to travel and is unconstitutional "'unless shown to be necessary to promote a *compelling* governmental interest. . . .'" *Id.* at 262, (quoting *Shapiro*, 394 U.S. at 634). This system is a penalty on the

exercise of the right to interstate migration as surely as tax on goods coming across the state line.[18]

Petitioners attempt to avoid the plain result of the classification scheme by arguing that the proper comparison is not of new and old California residents, but of new California residents before and after their move. Pet. Br. at 22-28. Petitioners assert that because new arrivals to California are not receiving less than they would have received in their former states, they are not "penalized," and thus there is no cause to question California's tiered benefit scheme.

Petitioners' argument misapprehends the applicable precedent of this Court. Petitioners claim that *Zobel*, *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985), and *Soto-Lopez* compared the disparate treatment accorded newcomers and long-term state residents only as a threshold matter, to see whether an equal protection challenge could lie. Pet. Br. at 23. Petitioners then treat these cases as if they have no further bearing on the constitutionality of classifications among residents that impose no overt "penalty" on the newcomer. The teaching of these cases cannot be cabined so narrowly.

In *Soto-Lopez*, the Court considered a New York law that granted civil service preferences to veterans who resided in New York when they entered the military. Newcomers were not deprived of a benefit they enjoyed in their previous state of residence. Nonetheless, a plurality of the Court held the preference unconstitutional for reasons that are applicable here: "Once veterans establish bona fide residence in a State, they

[18] Indeed, the United States parts ways with Petitioners for asserting that the restriction is not a penalty.

become the State's 'own' and may not be discriminated against solely on the basis of [the date of] their arrival in the State." 476 U.S. at 911 (quoting *Hooper*, 472 U.S. at 623). In turn, *Hooper* involved the constitutionality of a state property tax exemption for veterans who were New Mexico residents prior to specified dates. Although the recently arrived veterans lost no pre-existing tax exemption upon their move to New Mexico, the *Hooper* Court held that the state could not prefer established resident veterans over newcomers in the retroactive apportionment of an economic benefit. *Hooper*, 472 U.S. at 623. Similarly, in *Zobel*, the Court examined an Alaskan program that paid all residents some dividends flowing from its mineral wealth, but paid larger sums to longer term residents. Again, newcomers to Alaska were not "deprived" of anything by moving to Alaska; they were not receiving anything comparable from any other state. The Court nonetheless held that the state's classifications were unconstitutional. 457 U.S. at 63-64.

Subsequent to these cases, the Court has noted that the analysis in the right to travel cases "is informed by the same guiding principle -- the right to migrate protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents." *Soto-Lopez*, 476 U.S. at 904. Thus, under well-established Supreme Court precedent, California is burdening the right to travel by providing its new citizens with smaller subsistence benefits than those available to all other citizens -- even if the new citizens have not been deprived of a preexisting benefit.

II. CALIFORNIA'S RESIDENCY CLASSIFICATION CANNOT SURVIVE JUDICIAL SCRUTINY.

When a state imposes discriminatory classifications among its citizens, it has presumptively denied its citizens equal protection under the law and it will be required to defend the challenged classification. *Soto-Lopez*, 476 U.S. at 904. Where, as here, California law penalizes the right to settle in California by limiting (in some cases drastically) subsistence TANF benefits based on the length of the applicant's residency, strict scrutiny is appropriate. This law, however, fails regardless of the level of scrutiny applied, because California cannot demonstrate that its residency classification scheme bears even a rational relation to a legitimate state goal. Further, the California statute violates the Privileges and Immunities secured under Article IV and must be rejected on that basis as well.

A. Section 11450.03 Fails Strict Scrutiny.

As established above, § 11450.03 effects a substantial burden on Respondents' right to travel and migrate to another state. Thus, strict scrutiny is appropriate. This Court succinctly described the nature of the inquiry in *Soto-Lopez*: "[W]e asked expressly whether the distinction drawn by the State between older and newer residents burdens the right to migrate. Where we found such a burden, we required the State to come forward with a compelling justification." *Id.*; *accord Shapiro*, 394 U.S. at 634; *Dunn*, 405 U.S. 330; *Memorial Hospital*, 415 U.S. 250.[19] Further, California cannot choose means that

[19] This standard of review applies both when a right to travel claim is made distinctly from an equal protection claim or as part of it. "[R]egardless of the (continued...)

unnecessarily burden or restrict the constitutionally protected right to travel and migration: "[I]f there are other, reasonable ways to achieve [legitimate] goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference." *Dunn*, 405 U.S. at 343.

In this case, California asserts no compelling justification for its residency classification, *effectively conceding that it has none*. Instead, California relies exclusively on its argument that §11450.03 is a "statute in the area of economic and social welfare," so that the Court should apply only the 'rational basis' test. Pet. Br. at 13, 24 (citing *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970)).[20] Where California targets poor newcomers, it is engaged in invidious discrimination and should be put to its proof of a compelling justification. Petitioners' stated justifications for this law are not compelling. Furthermore, the purpose that appears to underlie the law -- inhibiting the migration of poor people into California -- is neither legitimate nor supportive of California's pretense of an economic theory.

Petitioners' brief identifies the general purpose behind its program as "reducing state expenditures and aiding in welfare

[19] (...continued)
label we place on our analysis -- right to migrate or equal protection -- once we find a burden on the right to migrate the standard of review is the same. Laws which burden that right must be necessary to further a compelling state interest." *Soto-Lopez*, 476 U.S. at 904 n.4.

[20] It is facile of Petitioners to argue that classifications among citizens are of no consequence if embedded in a "social or economic" scheme. *Dandridge* itself cautioned that a State may not "impose a regime of invidious discrimination in violation of the Equal Protection Clause of the 14th Amendment." 397 U.S. at 483.

reform." Pet. Br. at 26. Reducing state expenditures in no way justifies making an irrational classification among a State's citizens. As *Memorial Hospital* teaches, a "State may not protect the public fisc by drawing an invidious distinction between classes of its citizens" because "[t]he conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State." 415 U.S. at 263 (internal citations omitted); see also *Shapiro*, 394 U.S. at 633. Petitioners' passing reference to the purpose of "aiding welfare reform" is meaningless standing by itself and thus provides no support for the Petitioners' classification scheme.

Petitioners deny that there is any evidence that the primary objective of § 11450.03 is to impede travel. Pet. Br. at 17 and n.4. However, it is difficult to imagine that the prospect of impeding migration by poor people was *not* the statute's objective. Newcomers requesting TANF are the sole targets of § 11450.03. Indeed, Petitioners make lengthy reference to *Congress'* rationale for enacting the PWORA, namely to avoid creating "country-wide welfare magnets in high-benefit states." Pet. Br. at 8. Petitioners are understandably reluctant to admit that §11450.03 was designed to inhibit the migration of poor people into California, because such a purpose is recognized to be unconstitutional. See, *e.g.*, *Hooper*, 472 U.S. at 620 n.9 ("A state objective to inhibit migration into the State would encounter 'insurmountable constitutional difficulties.'") (citations omitted); *Zobel*, 457 U.S. at 62 n.9; *Memorial Hospital*, 415 U.S. at 263-64; *Shapiro*, 394 U.S. at 629.

B. Section 11450.03 Fails Intermediate Scrutiny.

The *amicus* brief of the United States provides further evidence that the classifications in §11450.03 are not benign and warrant more than rational basis review. The United States observes that California's effort to treat some of its citizens differently based solely on how recently they became residents is "constitutionally problematic." U.S. Br. at 18. As a result, the United States rejects Petitioners' assertion that rational basis is the appropriate standard of review.[21] It urges an intermediate level of scrutiny in which California must show that its residency classification scheme is (1) "substantially related" (2) "to an important governmental objective." *Id.* at 10.[22]

The United States' recitation of the presumed congressional goals does not constitute the "important governmental objectives," required under the intermediate scrutiny proffered by United States itself. Even if one were to attribute the presumed congressional goals to a State's statute, the goals given -- of achieving interstate integration and coordination, preventing the distortion of incentives, and promoting the effectiveness of the federal program, U.S. Br. at

---

[21] The United States concedes that California alone could not demonstrate an important governmental objective necessary to justify this classification. U.S. Br. at 20. It argues, however, that Congress' purposes supporting the authorization in PWORA for certain durational residency requirements could be attributed to state legislation that "fairly implements" it. *Id.* at 9.

[22] *Amicus* believes that strict scrutiny is the appropriate standard of review for laws substantially burdening the right to travel. However, the intermediate scrutiny standard, when carefully applied, will uncover egregious burdens on the right to travel, such as this law.

26, -- are makeweight, not legitimate or not well-founded. The goals of "interstate integration and coordination" and the "effectiveness of the federal program" do not even pertain to California's residency classification scheme apart from the remaining goal -- the often-mentioned desire to "prevent[] the distortion of incentives."

California's concern over "distorting incentives" is meritless. More fully stated, California's concern is that states will "race-to-the-bottom" in their TANF levels because one state's supposedly high level of payments will, all other things being equal, at the margin, attract more people than if it had lower payments.[23] Not only does this theory neglect the overwhelming incentives against such a race but it also omits the contrary empirical research and, in the end, would establish a perverse precedent useful to restrict any public good.

According to its own theory, California must restrict the supply of new entrants into the TANF program to avoid a plague of TANF-recipient locusts that will devour the available resources. TANF recipients, however, are also part of the pool of labor. Thus, it is equally valid to describe California's program as a systemic barrier to the entry of new workers who will bid down wages available to resident workers. California thus restricts the number of workers, so as to increase the costs of labor, *i.e.* wages, and to decrease economic efficiency. Cf.

---

[23] California relies on a small marginal tail of recent immigrants to wag the much larger dog of longer-term residents who receive TANF. The number of people who will move based on benefit levels cannot conceivably be significant in comparison to those who do not move. Indeed, the idea that large numbers of persons eking a living out of intermittent minimum-wage jobs could move mocks the realities of the working poor.

Papachristou, 405 U.S. at 161 (discussing similar aims of Statute of Laborers). California in effect suggests that it must be allowed to violate the right to travel, in order to save welfare for its "true" residents. Any coordination of legal systems, *i.e.* federal provisions or state compacts that eliminate such effects *while respecting personal rights*, can resolve such a dilemma.[24]

All things being equal and assuming that California's real level of payments are higher than surrounding states, some marginal "magnet" effect would be present. All other things, however, are not equal. Persons often will not know that a state provides higher benefits.[25] Moreover, to the extent that labor mobility depends upon factors extrinsic to the narrow monetary calculus that is supposed to drive TANF recipients, benefits levels in one state will not affect the benefit levels in another. People certainly move for a better job or even prospects for one, but people also move (or not) for reasons unrelated to money, *e.g.* the presence of familial resources,[26]

---

[24] While this Court does not decide policy debates, it does monitor the framework of such debates to protect individuals, especially when those individuals, such as newcomers, lack a political voice. See *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

[25] Most TANF recipients possess insufficient information to understand the true incentives. Without some tie to an area, such information is very difficult to get. *See, e.g.*, Barry Wellman, *The Place of Kinfolk in Personal Community Networks, in Families in the U.S.: Kinship and Domestic Politics* 231, 234 (Karen V. Hansen & Anita Ilta Garey eds., 1998). Any "race" to the bottom would feature many people running the wrong way.

[26] *See, e.g.*, Jacqueline Jones, *The Dispossessed: America's Underclasses from the Civil War to the Present* 215 (1992) ("changes in household composition often proved to be the precipitating factor" in migration (continued...)

sentimental reasons, or lifestyle reasons such as avoiding prejudice. Moving itself is very expensive and fraught with uncertainty, and the working poor lack access to national labor market information. Accordingly, in contrast to "race-to-the-bottom" participants that California hypothesizes, actual TANF recipients may not know the incentives, and, if they did, would discount benefits by the local cost of living and include moving costs and an uncertainty premium in evaluating their choices.

Accordingly, it is no surprise that, empirically, California is no magnet. Although the nominal level of benefits is high, the cost-of-living adjusted benefit level is significantly lower than many states. That fact may explain why, with 12 percent of the national population in 1996-97, California had only 10 percent of the AFDC caseload. See Pet. Br. at 4. Indeed, California appears to be *losing* population to other states.[27] Empirical

---

[26] (...continued)
decisions); *Id.* at 242-43 (migrants usually moved to cities where relatives were living); William Michelson, *Residential Mobility and Urban Policy, in Residential Mobility and Public Policy* 79, 81 (Urban Affairs Annual Reviews Volume 19, W.A.V. Clark & Eric G. Moore eds., 1980) (poor immigrants often move with help of family who preceded them); James N. Dertouzous & Robert F. Schoeni, *Preparing for Welfare Block Grants: Issues Facing California, in The New Fiscal Federalism and the Social Safety Net: A View From California* 19, 39 (James Hosek & Robert Levine eds., 1996) (family ties deter poor people from migrating to other states).

[27] *See* Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1997*, at 30 (117th ed. 1997) (California's net domestic migration from July 1, 1995 to July 1, 1996 was a loss of approximately 258,900 people.); Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1994*, at 29 (114th ed. 1994) (California's net residential change from April 1, 1990 to July 1, 1993 was a loss of (continued...)

research also does *not* support the supposition that welfare recipients migrate to maximize their benefits. Instead, interstate differentials in welfare benefit levels are found to have no effect on interstate migration.[28] The differences in benefit levels from one state to another are found to be not large enough to offset the costs of moving, which can include the costs of separation from family members who provide important resources.

In the end, California's "race-to-the-bottom" theory is a pretense that proves too much because *all* public goods provide an incentive for entry into a state. Good job training programs, schools, public medical care, parks, and so forth, all, at the margin, entice immigrants. The logical extension of California's program would restrict the ability of recent immigrants to enjoy such benefits so as to ensure their quality and availability for longer-term residents. Perhaps one could go to school after being in California for a year, use the library after two years, and graduate to emergency medical care access in the third year of residency. Such restrictions would be absurd. See, *e.g.*, *Memorial Hospital*, 415 U.S. at 261. This Court would not allow residency restrictions for matters of legislative grace

---

[27] (...continued)
approximately 739,000 people.).

[28] *See* James N. Dertouzos & Robert F. Schoeni, *Preparing for Welfare Block Grants: Issues Facing California*, in *The New Fiscal Federalism and the Social Safety Net: A View From California* 19, 37, 39 (James Hosek & Robert Levine eds., 1996) (citing James R. Walker, *Migration Among Low-Income Households* (Institute for Research on Poverty Discussion Paper 1031-94, 1994). Interstate migration motivated by different levels of welfare benefits is most likely for cities, such as Washington, D.C., that straddle state lines so that the cost of migrating is lower. California, however, has no major cities along its interstate borders.

outside the TANF arena, and it should not allow such restrictions on TANF benefits.

C. Section 11450.03 Is Not Rationally Related To Its Stated Goals.

Section 11450.03 is not rationally related to the goals ascribed to it by Petitioners and the United States.[29] As an initial matter, § 11450.03 was first enacted in 1992, four years *before* passage of the federal welfare reform statute, PWORA. Thus Petitioners cannot rely on the United States' argument that state legislation "designed and sufficiently tailored" to "fairly implement" the PWORA could rely on Congress' national goals. On a substantive basis, California's residency classification scheme is overbroad in relation to the repeatedly-invoked concern that high cash benefits in any given state will create incentives for indigent persons to move. Instead, §11450.03 targets *all* applicants for TANF benefits who have been resident for less than a year. It creates no exceptions, for example, for a person who moved for reasons demonstrably unrelated to TANF benefits, or who was gainfully employed upon arrival but who lost his job before a year had passed, or who became unemployed due to an accident or illness. The statute makes no attempt whatsoever to identify those incoming migrants who may be moving simply for a higher cash grant, such as persons

---

[29] By definition, therefore, it is not 'substantially related' to those goals under the intermediate scrutiny standard advocated by the United States. The United States articulated the showing a State must make in a PWORA implementation case as follows: "[W]hen an individual alleges that the State has unduly burdened the right to migrate, it is also appropriate for a court to assure itself that the State's action is designed -- and sufficiently tailored -- to serve the purposes of the federal authorization. U.S. Br. at 26.

who are employable but were nonetheless on welfare in their prior state, so as to deal with them particularly.

Conversely, § 11450.03 is underinclusive in other significant respects. In an effort to reform welfare by providing incentives to work, § 11450.03 provides the "incentive" of subsistence payments reduced below the California level to only a small subclass of persons who are receiving benefits but are employable and could be motivated to find work. Only newcomers from states with low welfare benefits suffer the incentive of reduced subsistence payments. Existing California residents are not prodded, nor are newcomers from states that paid higher benefits.[30] Even legal migrants from foreign countries do not suffer a reduction in California's subsistence payments. It is irrational to assume that among the TANF applicant pool, the subclass of newly arrived California residents haling from states with low welfare payments are somehow better able to bear a reduction in subsistence payments, or are more able to respond to this incentive. Furthermore, the savings to California's TANF program (effected by the reduction in benefits) is not the product of rational decision-making. It is simply fortuitous, the difference between the TANF cash benefit levels in California and in the applicant's prior state, should that be a lower-benefit state. Accordingly, § 11450.03 is not rationally related to the Petitioners' legitimate

---

[30] In addition to the many infirmities associated with its application, §11450.03 fails to address the problem laid out in the United States' brief. Footnote 5 describes a hypothetical 'distorted incentive' of a type that Congress presumably intended to avoid by authorizing a durational residency requirement. In the hypothetical, however, the strictures of §11450.03 do not benefit the state. The cash benefit in the new state (state B) is lower than in the original state (state A), so the newcomer would still be eligible for the full cash benefit in the new state.

objectives and fails the rational basis test. See *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 447-450 (1984) (rejecting a special use permit requirement for mentally retarded persons because that status was not relevant to the permit's purposes). A State may not make invidious discriminations among its citizens, even in the context of social and economic legislation. *Dandridge*, 397 U.S. at 483.

D. California's Program Fails Privileges and Immunities Scrutiny.

Another cogent way to analyze whether § 11450.03 imposes an impermissible burden on Respondents' right to travel is to consider the effect that the statute has on Respondents' privileges or immunities as United States citizens. The Privileges and Immunities Clause provides that States must treat residents and nonresidents without "unnecessary distinctions" when a nonresident seeks to "engage in an essential activity or exercise a basic right." *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U.S. 371, 387 (1978) (quoted in *Zobel*, 457 U.S. at 76 (O'Connor, J., concurring)).

The plain language of §11450.03 draws a clear distinction between old and new state residents to the detriment of the new residents for no other reason than they are new residents. Respondents are treated less well than comparably situated long term residents because they have exercised one of the most basic rights of United States citizenship -- the right to interstate travel and migration. See, *e.g.*, *Crandall*, 73 U.S. (6 Wall.) at 43-44; *Guest*, 383 U.S. at 757-58; *Moore*, 431 U.S. at 503. Justice O'Connor's characterization of the dividend plan invalidated in *Zobel* is equally apt here: "Stripped to its essentials, the plan denies [non-Californians] settling in the State

the same privileges afforded longer term residents." 457 U.S. at 73 (O'Connor, J., concurring). In these circumstances, the Privileges and Immunities Clause provides an appropriate analytical framework. The durational residency provision in §11450.03 is in force for an entire year. Throughout this time California treats new residents as if they were residents of their former states for the purpose of calculating TANF benefits. Indeed, California pegs the reduced benefit to precisely the grant available from the new resident's former state whenever the other state pays less than California.

California's durational residency distinction cannot stand unless a State can establish both (1) that those treated as non-residents "constitute a particular source of the evil at which the statute is aimed;" and (2) there is a "'substantial relationship' between the evil and the discrimination practiced against those treated as non-residents." *Id.* at 76 (O'Connor, J., concurring), see also *Hicklin* v. *Orbeck*, 437 U.S. 517, 526-27 (1978). California cannot meet this burden. As discussed above, Petitioners claim to be avoiding the primary "evil" of the drain on funds caused by residents applying for TANF assistance rather than finding work. Inasmuch as § 11450.03 targets only new residents, Petitioners must show that new residents are the "peculiar source" of the drain on funds for welfare. Petitioners have not argued, much less established, that new residents to California apply for TANF assistance in large absolute numbers or in markedly greater proportion than long-term residents, or that new residents are peculiarly unwilling to find work once they have settled in California.

Petitioners also cannot satisfy the second part of the privileges and immunities standard, *i.e.*, that the reduction in subsistence funds to new residents is "substantially related" to

the goal of preserving TANF funds or creating work incentives. Rather, California's actual savings by reducing subsistence benefits is wholly arbitrary. Though all new residents have reduced TANF payments for the first year, California only saves money on new migrants arriving from low cash grant states. Furthermore, the amount of the savings depends on the benefit scheme in whichever of the forty-four lower paying states the immigrant arrives. Such a scatter-shot plan does not substantially or meaningfully relate to fiscal responsibility. Indeed, to the extent the statutorily mandated reduction in TANF funds acts as an "incentive" for incoming migrants to find work, it is unjustified and arbitrary. Actual reductions in TANF benefits are levied only on a small subset of recipients, and there can be no showing that new residents from states that happen to have low cash welfare benefits are more in need of this draconian incentive than are migrants from other states or other countries. Indeed, the statute creates no comparable work incentive for long-term California residents, who certainly comprise the largest number of applications for TANF benefits.[31] Because California applies no work incentive to most TANF applicants, whether new or old residents, § 11450.03 cannot be substantially related to a governmental objective to create such incentives.

Petitioners have argued that Respondents' rights are not violated because they are not "worse off" with regard to TANF benefits than they were in their former state. Under a privileges and immunities analysis, as with an equal protection analysis, Respondents' right to interstate migration is burdened because they are singled out and treated less well than similarly-situated

[31] Respondents acknowledge that California's welfare statute contains certain work incentives for all residents who receive TANF funds.

citizens. For example, in *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), this Court sustained a privileges and immunities challenge to a tax New Hampshire levied only on in-state income earned by non-residents. New Hampshire defended the statute by arguing that the non-residents' tax burden was not increased because their home states credited the New Hampshire tax paid against their home state tax bill. The Court rejected the argument, ruling that the statute was a "unilateral imposition of a disadvantage upon nonresidents." *Id.* at 667 n.12. As Justice O'Connor's indicated in *Zobel*, the existence of a burden on a fundamental right is to be found by comparing residents and non-residents, or those treated as non-residents. "The 'burden' imposed on nonresidents is relative to the benefits enjoyed by residents. It is immaterial, for purposes of the Privileges and Immunities Clause, that the nonresident may enjoy a benefit in the new State that he lacked completely in his former State." 457 U.S. at 76 n.6 (O'Connor, J., concurring).

III. CONGRESS CANNOT AUTHORIZE CONSTITUTIONAL VIOLATIONS BY RE-DEFINING THEM AS A "CHOICE OF LAW."

Congressional authorization for a State to violate a constitutional right does not change the manner in which a court should scrutinize the governmental action at issue. Despite the United States' attempt to re-categorize PWORA as a "choice of law" provision, mere passage of a bill by Congress does not support Petitioners' statute. Article III courts or the Article V amendment processes are the proper fora for such consideration. See, *e.g.*, *City of Boerne* v. *Flores*, 117 S. Ct. 2157 (1997); *Plaut* v. *Spendthrift Farm, Inc.*, 1514 U.S. 211 (1995). As this Court has opined: "Congress may not authorize States to violate the Equal Protection Clause . . . [and] is

without power to enlist state cooperation in a joint federal-state program by legislation which authorizes the States to violate the Equal Protection Clause." *Shapiro*, 394 U.S. at 641. The fact that a national, as opposed to state, majority has authorized a penalty on new immigrants does not affect the level of scrutiny to be applied. Discrimination merits no less strict scrutiny when practiced by the federal government. Compare *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995) with *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989). Likewise, Congress cannot violate the rights of national citizenship or authorize the violation of such rights by a State.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

Ann E. Bushmiller*
Edward R. McNicholas
SIDLEY & AUSTIN
1722 Eye St., N.W.
Washington, DC 20006
(202) 736-8253

Maria Foscarinis
NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY
918 F Street, N.W., Suite 412
Washington, DC 20004
(202) 638-2535

Counsel for Amicus Curiae

*Counsel of Record

December 8, 1998